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Wimping Out: Practicing Arbitrators Look at Reinstatement Without Backpay

by Daniel Nielsen, Christine VerPloeg and James Martin

I. Introduction

If the labor arbitrator's function in resolving a dispute is likened to that of King Solomon,[1] some parties are heard to complain that the arbitrator's resolution is too often Solomonic as well - splitting the baby between them rather than providing a clear-cut (so to speak) winner and loser. This complaint is most pronounced in discipline cases, where critics complain that arbitrators too often succumb to the temptation to let both parties win by finding that there is just cause for discipline, but that the penalty should be modified or reduced. Reinstatement without backpay is perhaps the clearest example of such a "compromise remedy." Supporters of compromise remedies protest their characterization as "wimping out," and argue that arbitrators not only have the right, but also the duty, to temper penalties that have gone beyond the range of permissible discipline.

This Article follows up on a presentation at the FMCS Arbitrators' Symposium held on October 12, 2001 at the Chicago-Kent College of Law. Three practicing arbitrators explore the bases on which an arbitrator might justify a "compromise remedy" in a discipline case, some of the considerations, practical and legal, that militate in favor of and against such an approach, and the types of cases that lend themselves to reinstatement without backpay.

II. Authority to Modify Penalties - Or Who Died and Made You Personnel Manager?

Are arbitrators who modify penalties acting within their jurisdiction, or are they engaged in a blatant power grab? This question does not arise if the contract contains a specific limitation on the arbitrator's authority to reduce or modify disciplinary penalties, for the arbitrator, as a creation of the contract, is bound to its terms. Some contracts, for example, contain language directing that, in discharge cases where the arbitrator determines there was not cause for discharge, he or she shall award reinstatement and full backpay. Others specify that the arbitrator shall have no authority to substitute his or her judgment for that of management if just cause for discipline is established. Such clauses are specifically designed to prevent an arbitrator from reducing penalties, and arbitrators will honor those express directives, as they will honor contracts that expressly contemplate the reduction or modification of discipline. The question of arbitral authority to modify discipline arises where the contract is silent.

A. The General Authority Of Arbitrators To Reduce Or Modify Discipline

Most contracts are silent on the issue of remedies, leaving it for the arbitrator to decide whether, and to what extent, to reduce or modify a penalty. Arbitrators who assume that they have broad remedial powers frequently take their authority from the contract's just cause provision and in the statement of the issue, e.g. "Did the Employer have just cause to terminate the Grievant? If not, *what is the appropriate remedy*?"

Given that the authority of an arbitrator to modify a penalty is a matter of an arbitrator's individual judgment or philosophy, it is not surprising that the published awards reflect a wide range of views. At one end of the spectrum, a distinguished minority of arbitrators holds to the view expressed by Whitley P. McCoy in 1947:

> If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe

> penalty than the arbitrator would have, if he had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in one man's eyes may be only slight aggravation to another. If the arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be intolerable to employees as to management.[2]

While McCoy's Award is often cited as the basis for completely accepting or completely rejecting the penalty in every case, the quoted text contains enough qualifiers to allow an arbitrator to cite it no matter what he or she intends to do as to penalty. The arbitrator need merely find that "good faith," "fair investigation," and/or "consistency of penalty" are absent, or that the penalty is more than "somewhat more severe" than the arbitrator would have imposed.

Despite the wiggle room Arbitrator McCoy's oft-cited language provides, it reflects wide-spread concerns that second-guessing a penalty where an employer had just cause to discipline is simply bad practice. Critics ask: Who died and made you Personnel Manager? What can an employee do to get a twelve month suspension that wouldn't also support discharge? What message does a reduced penalty send to the folks on the plant floor? How can an arbitrator show mercy in this case and not the next?

Despite these concerns, the more widely adopted view is that the arbitrator has the inherent power to modify or reduce penalties, and should exercise this power in appropriate cases. It has been variously posited that this authority inheres in either: (1) the determination of just cause;[3] (2) the power to review the case;[4] (3) the authority to settle and adjust the dispute;[5] or (4) the general obligation to provide a fair and just result.[6]

In some cases, the authority to reduce discipline may be inferred from a practice, work rule, or specific contract provision providing for a set progression of discipline. Where employers depart from these progressions without sufficient explanation, arbitrators may deny that they are substituting their judgment for management's, explaining that in reducing the penalty they are simply deferring to management's prior judgment. For example, if the contract calls for a progression from a verbal warning to a written reprimand to a one day suspension to a three day suspension before discharge, and the employer proceeds immediately to discharge in a routine absenteeism case, the arbitrator may reduce the penalty to a reprimand and credibly claim to be deferring to the parties' judgment as to appropriate penalties.

B. Public Policy as a Limitation on the Arbitrator's Remedial Authority and a Positive Mandate to Substitute Penalties and Place Conditions on Reinstatement

In the *Vera DuBose* case,[7] a well known Illinois Supreme Court decision dealing with the relationship between an arbitrator's remedial authority and the dictates of public policy, an arbitrator reinstated a child welfare worker accused of falsifying reports to the Department of Children and Family Services and to the courts. The basis of the reinstatement was the arbitrator's finding that the discipline clearly violated the prompt discipline provisions of the contract.

A circuit court vacated the award on public policy grounds and the Illinois Appellate Court reinstated it. On appeal, a sharply divided Illinois Supreme Court vacated the award, holding that the public policy in favor of protecting children and the integrity of reports to the courts in child welfare cases trumped the contract and the usual deference to arbitration, and forbade the reinstatement of DuBose. While the holding in *DuBose* is often criticized as contrary to the general deferential standards for review of arbitration awards, the language of the majority opinion actually suggests that arbitrators have very wide remedial authority, and that arbitrators may have an affirmative duty to modify penalties and craft conditional reinstatement orders to make the award consistent with public policy.[8]

The most important implication of *DuBose* for practicing arbitrators is that they must make specific factual findings to support their decisions, both as to the merits and as to the appropriateness of the remedy, where public policy arguments are likely to be raised. This is particularly important if arbitrators do not wish to impose conditions on reinstatement or award lesser penalties. A second implication is that arbitrators may have an obligation to modify the penalty if they find that relief is warranted. To satisfy a court's public policy concerns, arbitrators may be required to insure that some punishment has been imposed or that conditions have been placed upon the

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reinstatement to safeguard the public.

III. Categories of Cases That Lend Themselves to Reinstatement Without Backpay

It is not possible to precisely predict when an arbitrator will order reinstatement without backpay. In some cases, the arbitrator does not discuss the exact reason for electing that remedy, although the reader may make an educated guess from the award. Some are based purely on mitigating circumstances, principally the employee's long service, and come close to the exercise of mercy, a function that arbitrators routinely identify as the exclusive province of management. Others reflect a discomfort with the grievant's conduct or character, notwithstanding the conclusion that the employer overstepped its bounds in the discharge.

Adding to the difficulty of predicting when reinstatement without backpay may be ordered is the problem of source data. Discussed below are cases drawn from the BNA reporters in which the remedy was found appropriate. The dogs that are not barking in this survey are the cases in which the remedy was considered by the arbitrator and rejected. Using only the cases in which the remedy was used, some general categories of cases lending themselves to a remedy of reinstatement without backpay (or in a few instances, reduction to an exceptionally lengthy suspension) can be identified: (1) cases in which the discharge decision is tainted by procedural defects in the disciplinary process; (2) cases in which the conduct is serious, but the employer deviated from prior standards regarding penalties; (3) cases in which the discharge is premised on multiple charges, some of which are not proved at arbitration; (4) cases in which the grievant is guilty of misconduct but fault is shared, in that the conduct was also prompted by the actions of another, or by a condition beyond the grievant's complete control. A fifth and unusual category of cases in which reinstatement without backpay has been employed is where the arbitrator finds no just cause for discipline, but concludes that, because the grievant contributed to the discharge decision, backpay is inequitable.

A. Procedural Defects

An arbitrator who finds discharge supportable on the merits may nonetheless look at reinstatement without backpay if there is some substantial procedural defect associated with the case. Arbitrators who do so go beyond the role of fact-finder to become monitors of the process, on the apparent theory that results can be trusted only if the process has been trustworthy. Even arbitrators who urge that process should be left to the parties will hesitate to defer where there has been egregious unfairness. Thus, there are many cases in which the penalty imposed on a "guilty" grievant has nevertheless been reduced or modified on the ground that the employer's defective procedure has failed the collective bargaining process in important ways.

The cases in which flawed process has apparently justified reducing what would otherwise have been appropriate discipline largely fall within three broad categories. (1) "Failure of notice" cases are premised on the concern that grievants were given insufficient notice of the charges against them to respond meaningfully. Although arbitrators do not typically require employers to have outlined every detail of their suspicions, they do require general notice of the nature of the claims. (2) Failure to provide union representation may taint an otherwise supportable discharge. Although the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*[9] does not technically apply to most arbitrations, many arbitrators subscribe to its directive that the employer must honor a grievant's request to have a union representative present when responding to charges for that response to be meaningful. (3) An employer's delay in alerting an employee to possible discipline can also be a basis for modifying what would otherwise be an appropriate penalty, especially where the delay has hindered the employee's ability to collect relevant evidence or otherwise present his or her best case. This can be true even where an employer has delayed for charitable[10] or other good reasons.[11]

Illustrations of procedural defects abound. For example, in *Rockwell International Corp.*,[12] the arbitrator dealt with an employee with numerous absences and tardies, who had been verbally warned, warned in writing, and suspended with notice of termination for another offense. He thereafter had eighteen more tardies and absences in a four month period. Most of the absences were due to health problems. The arbitrator noted that the final notice was far more general than the previous notices, and did not specify the dates that triggered the discharge. The arbitrator found this notice defective because it did not give the grievant a reasonable opportunity to explain his attendance problems. The arbitrator also observed that the contract provided for mandatory medical leaves when an employee fell below standards due to medical problems, and concluded that this provision should have been applied to the grievant. The arbitrator did not discuss the relative importance of the notice problem and the leave language in ordering that the grievant be placed on unpaid medical leave for the duration of the discharge, and reinstated subject to the normal requirements for return from leave.

In *Coca-Cola Bottling Co. of New York*,[13] a driver failed a drug test. The arbitrator accepted the test's validity and rejected the grievant's explanation that he inhaled marijuana smoke at a party.The arbitrator found, however, that the grievant had not been advised by the company's medical review officer of his right under Department of Transportation regulations to a

split sample test to confirm the initial positive test. The arbitrator wrote, "Accepting Dr. Ciuffo's testimony in the best possible light, it remains unclear and uncertain that the Grievant's rights enumerated in the federal regulations were fully and properly communicated to him. Thus, under the doctrine of due process and fairness inherent in the just cause standard, the discharge cannot be upheld."[14] The arbitrator directed that the grievant be reinstated, without backpay or benefits, subject to passing a newly administered drug test.

In *SK Hand Tool Corp.*,[15] the grievant became enraged when she received a check containing what she believed were improper deductions. In the course of a heated discussion, the grievant slapped the company's payroll administrator. The plant manager heard shouting and came into the payroll office after the grievant had stormed off. The payroll manager told him what had happened and he gave her permission to leave and get her glasses fixed, since they had been broken in the altercation. He then summoned the union committee and the grievant and told them he was firing her for hitting a supervisor. They asked where the supervisor was, and he said she went to get her glasses fixed, but they could speak to her later in the day. The grievant followed him out of the meeting and asked if she could tell her side of the story. He said he would not speak to her without a union representative present. The shop committee chair was summoned, but when he arrived, the manager told him to walk the grievant out of the plant. He also barred the grievant from returning to the plant for a grievance meeting later that day.

The arbitrator found that the assault took place as the supervisor described it, and noted that the rule against fighting allowed for but did not require discharge. She rejected the union's disparate treatment theory, but concluded that the investigation was unfair, because the plant manager had decided on discharge before speaking with the grievant and then refused to let her explain herself or to confront her accuser. The arbitrator wrote, "Management's investigation was unfair to [the grievant]. She was denied the right to face her accuser and be heard in her own defense."[16] The arbitrator also expressed doubts as to whether the punishment of discharge was appropriate, given that the Grievant used an open hand, rather than a closed fist, in what was essentially a one punch fight. At the same time, she noted that fighting could not be condoned. As a remedy, she ordered that the grievant be reinstated as a new hire, without backpay or benefits, until she completed a 30-day probation period, at which time her seniority and pay grade would be restored.

In *Buttrey Food and Drug Co.*,[17] the grievant, a truck driver with seventeen years of service and no record of discipline, was arrested for sexual assault and released on bail. One of the conditions of bail was that he not leave the county and another was that he not have contact with minors. He informed his supervisor of his arrest, but not of the bail restrictions. When the company later learned of the conditions, it terminated him for dishonesty in failing to reveal the conditions of bail, and because the conditions made it impossible for him to perform his duties, which included driving outside the county and working with minors employed by the company and its customers. The union argued that the grievant mistakenly but honestly thought the conditions did not apply during work hours. The arbitrator found this claim not credible, and concluded that there was just cause for discipline. He further found that the nature of the grievant's dishonesty was less than in a case of theft, embezzlement, or falsification, and that it was possible to mitigate the offense. In concluding that the grievant should be reinstated, the arbitrator placed great weight on procedural defects in the termination process. Specifically, he noted that the company relied on information gathered by its loss prevention manager, who never spoke with the grievant, and never asked for his side of the story. The arbitrator reasoned, "While there are some differences of opinion among arbitrators, the weight of authority is that industrial due process should be considered an element of just cause. Discharge and disciplinary actions must include basic notions of fairness and due process which include the right of an employee to have an opportunity to be heard in his/her own behalf before 'sentence is carried out.'"[18] The discharge was reduced to a 120-day suspension, approximately one half of the elapsed time between the discharge and the award.

A notice defect sent the Grievant back to work in *Illinois-Iowa Gas & Electric Co.*[19] There, the grievant used his skills to restore gas and electrical service to his home after it had been terminated for non-payment of bills. His provider, which was also his employer, discharged him for theft. The arbitrator found that discharge was among the possible appropriate penalties, and that it had been used in the past. However, he expressed concern that there was no notice to employees that this offense would be exempt from the progressive discipline system. "Under these circumstances, regardless of the essential lack of merit to the Grievant's claim, the organizational protocol of the Union-Company relationship requires that mandatory discharge be set aside in this instance so that appropriate steps to effectuate the rule may be taken before it is generally applied."[20] He therefore reinstated the grievant without backpay, and authorized the company to publish a rule equating theft with immediate discharge.

A similar result was reached in *H. Meyer Dairy Co.*[21] The grievant was discharged for allowing his son to ride on his ice cream delivery truck in violation of a clear rule that stated, "Violation can result in immediate dismissal."[22] How-

ever, the arbitrator found that the rule was uncertain as to whether termination was the required penalty.

> The significant point is that no announcement issued by the Company in respect to the no-rider or no-helper rule declared that discharge, dismissal or termination was to be mandatory or automatic for any driver having a rider on his truck. 'Can result' suggests only the possibility or at most the probability.[23]

The arbitrator noted the grievant's long service with the company, and reinstated him without backpay.

B. Deviation From Established Standards

Perhaps the easiest justification for a reduction of penalty is the case in which the employer fails to follow established practices regarding penalties in similar cases. This can take two forms. First, if the practice is formalized in a schedule of penalties, through a specification of progressive discipline in the contract itself or in the work rules, an unexplained deviation from the schedule will be attacked by the union as a failure to apply progressive discipline. Second, if there is no formal specification of progressive or corrective discipline, it may be inferred from the general notions of just cause, or from an examination of the penalties imposed in past cases.

In *James Hardie Gypsum*,[24] the grievant was terminated under an attendance control program for his seventh incident of tardiness. The program called for termination on the seventh occurrence. However, the company failed to issue a final written warning to the grievant after the sixth incident, even though its procedure required such a warning and it had issued such warnings in past cases. The arbitrator concluded that the company failed to follow its own progressive discipline system:

> As a general rule, in order to support discharge under an absenteeism/tardiness control program, formal notification must be given to an employee of the consequences of further absences. In this case, the Arbitrator is of the opinion that the Employer failed to follow its own progressive discipline procedure, and as such, must conclude the termination of the Grievant was inappropriate and must be modified.[25]

The penalty was reduced to a four month suspension and five months of backpay, with a last chance reinstatement.

General Electric Co.,[26] falls in the first category. Arbitrator Bridgewater found that there was evidence of penalties less than discharge for theft in the past, and that the work rules specifically allowed a range of discipline for major offenses. He concluded that a termination for theft did not give proper consideration to the possibility of lesser discipline.

In the second category are cases in which the arbitrator finds no formal commitment to progressive discipline, but infers it from the existence of a cause standard. "In the absence of extreme misconduct, an employer is generally obligated to follow a practice of progressive discipline. Discharge is normally reserved for those cases where either previous progressive discipline has not corrected the problem or the employee has engaged in such flagrant misbehavior to warrant the immediate severance of the employment relationship."[27]

In *Customized Transportation, Inc.*,[28] the arbitrator concluded that discharge was too severe where the employee was effectively denied progressive discipline. The grievant, who was discharged for racial harassment of the only African-American employee at the facility, had twice been cautioned against racial slurs. The arbitrator found that these prior counselings put the grievant on notice that his conduct was unacceptable. However, the arbitrator also concluded that the lack of a union steward at these counseling sessions could have caused the grievant to misunderstand the seriousness of the matter, and precluded their use as evidence of prior discipline. He reasoned that "the absence of a Union Steward at the earlier two meetings means that no effective progressive discipline was applied in this case."[29] The arbitrator further noted that "he was not the only employee engaging in race based teasing or taunting" and that "the Grievant was treated somewhat differently than other employees who engaged in similar acts."[30] The arbitrator reinstated, without backpay on a last chance basis.

In a fairly obvious case of disparate treatment, *Southern California Rapid Transit District*,[31] the grievant was discharged for illegally selling Saturday night specials to another bus driver on company time and premises. The other driver distributed the guns in the community, where some were ultimately used in crimes. The other driver was not discharged, and was later promoted to a supervisory position. The arbitrator found cause for discipline, but ordered reinstatement without backpay. He wrote, "[I]t is only the special circumstances prevalent here of the disparate treatment that leads me to direct this finding. That disparate treatment is so gross a disparity that I cannot accept the remedy the District here imposed on G." [32]

A similar result was realized in *Imperial Clevite, Inc.*,[33] where the grievant was discharged for intoxication and fighting. The evidence showed that prior instances of intoxication led to the employee being sent home, and that the other party to the fight, who landed a violent blow to the grievant, was given only a three-day suspension. Likewise in *Firestone Synthetic Rubber and Latex*,[34] the grievant made racial slurs and harassed women and members of different racial groups. However, no consideration was given to lesser penalties, even though two other employees with similar offenses had, in the past, been given second chances.

In *City of Huber Heights, Ohio*,[35] a police officer failed to report that a fellow officer punched a suspect, and lied about

the matter when asked by Internal Affairs. The officer who punched the suspect, and a sergeant who had also punched and kicked the suspect, were both suspended for nine months. The grievant was terminated, in part because of a prior 12-day suspension he had received for firing his weapon into the air at a party with other police officers a year earlier. The arbitrator concluded that the grievant was the least culpable of the three officers, and that the penalty of discharge could not be squared with the discipline meted out to the two more culpable officers. He noted that the lapse of time between the discharge and the award, some seventeen months, meant that, as a practical matter, the grievant was receiving a longer suspension than the other two officers.

C. Failure of Proof

Another fairly obvious basis on which discipline may be reduced is where the company (1) fails to fully prove the charge; and/or (2) fails to prove all of the charges, where the discharge is premised on several offenses. These cases can hardly be viewed as second-guessing an employer, or "wimping out" in a show of mercy, as the penalty is not compromised so much as it is recalculated to fit the proven facts.

Fairly typical of the first line of cases is *Van De Kamps, Inc.*,[36] where a maintenance employee was terminated for insubordination for refusing an order to leave the plant and threatening a supervisor. The arbitrator found that, given the conflicts in the testimony and the lack of corroboration for either man's version, the threat was not proved. He found, however, that the grievant had refused to respond when the supervisor asked if he had just threatened him, and that the grievant also refused to leave the premises when ordered to do so. Thus the grievant was guilty of insubordination, but the aggravating element of a threat was not proved. The arbitrator reduced the penalty to reinstatement without backpay.

The question of intent was critical in *Grant Hospital of Chicago*,[37] involving a hospital housekeeper who was terminated for stealing flowers from a patient's room, and lying about the incident. It was undisputed that the grievant took flower arrangements from a patient room she was assigned to clean, and gave them to other patients and other employees. However, the evidence allowed for the grievant's explanation that she thought the patient had been discharged from the hospital and left the flowers behind in the room. Room cleaning was usually undertaken when a room was vacated, and the grievant made no effort to hide what she was doing from other employees. Observing that "an employee cannot be guilty of theft absent an intent to steal,"[38] the arbitrator concluded that the theft charge could not be sustained. The arbitrator, however, also conclude that the grievant was guilty of insubordination for having lied to hospital officials about the incident, and that she used poor judgment in taking the flowers without express authorization to do so. These factors led him to find that she lacked "any equitable claim for back pay."[39]

In *System Sensor*,[40] an employee was terminated for threatening another employee with a power screwdriver, saying she wanted to kill her, and throwing a duct housing unit at her. The arbitrator found that the grievant had brandished a screwdriver and threatened her co-worker, but that she had not thrown the duct housing unit at her. Reasoning that this was "clearly the more frightening and dangerous" act, and that the discipline was based on "the two step attempt,"[41] the arbitrator concluded that management might well have imposed lesser discipline had it proceeded only on the threat with the screwdriver. The arbitrator found reinstatement appropriate because the more serious charge was not proved, and thus the degree of loss of control was not as severe as claimed by the company. She also found that the threat with a power tool was serious misconduct and the company might well have elected to fire the grievant for that offense alone. The lengthy unpaid suspension would also serve, the arbitrator opined, as fair warning to the grievant about the seriousness of losing her temper and making threats.

In *Aeronca, Inc.*,[42] the grievant was discharged for drug distribution on company premises. The arbitrator noted that the company had two different rules regarding illegal drugs - one for dealers mandating immediate discharge, and a more lenient rule, for users allowing them a second chance. The evidence persuaded the arbitrator that the grievant fell somewhere between the two, acting as a go-between for a dealer and the undercover police officer who was buying drugs, and occasionally dispensing small amounts of drugs incidental to personal use with others. From the record evidence, the arbitrator concluded that this was the first case of its type. She determined that "a one time, in-between last chance remedy-namely, a reinstatement without backpay" would be warranted.[43] The arbitrator ordered that the award be communicated to employees as a warning that in the future dispensing even small amounts of drugs would be grounds for discharge under the dealer rule. She also conditioned reinstatement on a successful drug test.

Consumer Plastics Corp.[44] starkly illustrates the dangers of overcharging in a termination case. The grievant filed a false claim for workers compensation, misrepresenting the cause of an accident and the extent of his injuries, in part so that he could stay away from work and catch up on a backlog of work at his outside employment. The arbitrator found ample evidence of guilt on a charge of fraud. The company also charged the

grievant with abusing a leave of absence by having other employment while on leave, but the arbitrator found that the cited article did not apply to the grievant's situation. While recognizing that the workers' compensation fraud could justify discharge, the arbitrator agreed with the union that the company probably charge the additional misconduct because it felt it could not support the discharge on the basis of the false compensation claim alone. He therefore ordered reinstatement, without backpay. The refusal of backpay was not expressly explained, but was presumably in recognition of the severity of the proved offense.

D. Grievant Not Solely at Fault

There are many cases in which arbitrators reduce terminations to unpaid suspensions, notwithstanding their conclusions that the grievants are guilty of misconduct, because the grievants are not wholly at fault. In some cases, the company shares fault for the situation leading to the discharge, so the arbitrator concludes that the grievant shouldn't shoulder all of the consequences alone. In others, a proven medical or psychological condition explains what would otherwise be willful misconduct so that the arbitrator, in what some protest represents an act of mercy at the Employer's expense, reduces what would otherwise be justifiable discipline.

In *United Rigging and Hauling, Inc.*,[45] the employer fired a driver based on insubordination for walking out of a conference with the company comptroller about the amount of fuel consumed on a trip. The arbitrator found that the grievant could reasonably have believed that the meeting was investigatory in nature, and that he should have demanded the presence of a steward (as provided in the contract) rather than walking out. However, he also found that the company's comptroller helped escalate the meeting into an argument, and should have taken steps to bring in union representatives to facilitate a meaningful dialogue. The shared fault led to a shared penalty, in that the company was required to reinstate the worker, and the worker was obliged to forego backpay.

Medical ailments have been found to lessen culpability in a variety of cases. In *Stein, Inc.*,[46] the ailment leading to discharge was claustrophobia, and the offense was insubordination. A maintenance employee who was required to do repair work in a salt mine deep below Lake Erie snapped when he learned that his work in the mine had been extended past its initial schedule of two work weeks. He directed an obscene tirade at the managerial employee who delivered the news, and flatly refused the order to return to the mine for work. The arbitrator found that the grievant's actions were not within his control and were not "the calculated and deliberate attempt of an employee to undermine managerial authority." Rather, they appear to be an out-of-control tirade of a very angry, disappointed and fearful man."[47] He concluded that the Grievant should be reinstated without backpay, effectively a suspension of nine months.

In another case, the arbitrator found that a mix of employee fault, employer fault and a medical condition led to a termination. In *General Mills, Inc.*,[48] the arbitrator concluded that an employee discharged for absenteeism suffered from seasonal depression each spring and fall, and that his absences were principally due to this condition. The arbitrator noted that the Company was aware of the condition, was aware that his pattern of absences was consistent with the malady, and was aware that one symptom of the disorder was an inability to seek early medical care when an attack was suffered. Thus, the employee could not conform to the company's rules, which required a medical excuse within the first days of an absence. On the other hand, the arbitrator noted that there were other instances in which the grievant had not supplied medical documentation even months after an absence. The arbitrator found that the grievant's behavior was not wholly within his control, but that he had failed to comply with the attendance program in some cases when he could conform. Consequently, he reinstated the grievant, without backpay for a one year trial period during which he was to participate in the Employee Assistance Program and be evaluated for continuing fitness for duty.

Another case in which medical reasons and shared fault underlay an order of reinstatement without backpay was *Snap-On Tools, Inc.*[49] The grievant lost part of his finger in an industrial accident. He was off work for eight months. On his return, he began a pattern of attendance problems, for which he received progressive discipline. He reached the termination step three months after his return to work. At the arbitration hearing there was medical testimony to the effect that the grievant suffered from post-traumatic stress disorder as a result of the accident, with attendant depression. The arbitrator credited this diagnosis, and concluded that his absenteeism was not wholly within his control. "Under these principles and Wisconsin state law, the Arbitrator concludes that the Employer had a duty to reasonably accommodate the Grievant as a disabled person during the time leading up to his discharge."[50] While acknowledging that the grievant never told the company about his disability, the arbitrator observed that there was sufficient notice that the attendance problems were associated with the injury such that the company had an obligation to investigate further before terminating him. He also found that the employee shared the blame for the situation, since he did not make reasonable efforts to advise the company of his condition, and that the company had a legitimate concern over the grievant's ability to function as an employee. The arbitrator ordered the

grievant reinstated without backpay, subject to an examination by an agreed upon psychiatrist or physician to determine his suitability for return to work.

Fault by the union may also affect the remedy. In another attendance case, *Southern California Rapid Transit District*,[51] the grievant failed to disclose to her employer that the reason for her frequent absences was bleeding caused by fibroid tumors, a condition for which she had failed to seek treatment. The arbitrator found that this would have qualified as an emergency that would have excused her final absence. However, he also found that the union had taken a misleading position early in the grievance procedure, when it asserted that the grievant was suffering from an occupational illness. The Transit District very strongly rejected this theory and refused any efforts to set aside the discharge short of arbitration. The union did not drop its workers compensation argument and change to an excused absence theory of the case until the arbitration hearing itself. The arbitrator denied backpay, principally because the union's initial theory of the case had caused the employer to dig in, and denied the employer the opportunity to evaluate the later, more meritorious explanation for excusing the grievant's absence.

E. Employee Contributed to Discharge, Even Though There Was No Just Cause for Discharge

In most instances, an argument can be made that reinstatement without backpay is a remedy favorable to the employee, since the arbitrator concludes that there was just cause for very serious discipline, but allows the employee to retain his or her position. There are cases, albeit infrequent, in which the employee is found innocent of misconduct and is nonetheless denied the traditional make whole remedy.

One type of case that readily lends itself to this analysis arises where an employee walks off the job in a job assignment dispute, and is mistakenly considered to have voluntarily quit. In *Buckeye Steel Castings Co.*,[52] the grievant returned from a leave of absence. He had worked as a mill operator before going on leave, and when he was assigned to work as a laborer, he objected and argued with management about the assignment. The grievant stormed out, without punching in for the shift, then contacted the union. The company treated him as a voluntary quit. While the arbitrator found that he did not intend to quit his job, he also found that his conduct was not reasonable, and that he should have accepted the assignment and pursued his contractual remedies, rather than walk out. Since his actions essentially created the mistake of fact over whether he had quit, he was denied backpay.

Another case in which there was not just cause for discipline, yet a full remedy was withheld is *Valuerx Pharmacy Program, Inc.*[53] The grievant was fired for failing to promptly return from a medical leave. The arbitrator found that the grievant was legitimately ill, and that her failure to return was prompted by her belief that she needed to obtain additional medical clearance. He also found that there was no firm return date set by the company and that the company did not attempt to reach the grievant before terminating her. However, he further concluded that there was considerable laxness on the grievant's part in keeping the company apprised of her status, as required by the employee handbook, and she thus contributed to the discharge. Even though there was not just cause for discharge, the arbitrator opined that "she is not deserving of backpay because her faults were considerable in this dispute."[54]

Finally, in *Lincoln Lutheran of Racine*,[55] the grievant was accused of insubordination for a confrontation with a nurse. The arbitrator found that the grievant, who was also the chief steward, shook her finger at the nurse, and referred to their disagreement as a "black and white issue." When asked later about the incident by the director of nursing, the grievant refused to discuss it with her, simply telling her to do what she had to. She was immediately terminated. The arbitrator found that the nurse was not a supervisor, and that the nurse had played a major part in escalating the meeting, by showing a complete lack of respect for the grievant. The arbitrator concluded that there was no insubordination, although the grievant was louder and more aggressive than she should have been. He also found that the employer's failure to investigate tainted the discipline decision. Having said all of that, he further found that the grievant could have avoided the termination by cooperating with the investigation, and that this precluded an award of backpay:

> The failure to cooperate, for whatever reason, precludes such payments." ... "W_ did not tell Muszytowski her side of the story. Although Muszytowski did not diligently try to learn W_'s version, W_ should not be able to benefit from her own non-cooperation. She must share the responsibility for the multiple errors. It would be unfair to compel Lincoln Lutheran to provide backpay to W_, when she did not take advantage of the opportunity to defend herself.[56]

IV. Conclusion

The number of reported cases in which reinstatement without backpay is ordered is not insignificant, but it remains the case that the vast majority of the discharge cases where just cause for discharge is not proved will result in a standard remedy of reinstatement and make whole relief. Even for those arbitrators who have more than one reported case involving reinstatement without backpay, those cases represent a tiny fraction of the arbitrator's entire body of work. Yet it is remedy that the majority of arbitrators recognize as available to them, if only as a last resort

where the fiction that we do not second guess management's discretion runs up against the reality that that is precisely what applying a just cause standard requires in many instances. It is apparent from the cases in which the compromise remedy is utilized that arbitrators are keenly aware of the slippery slope they are treading with their remedial power, and are at pains to keep open their lines of retreat by explaining, even if not always convincingly, the specific and narrow reasons for the remedy in that particular case and no other. ◆

Notes

[1] *See generally* THE BIBLE (various authors).
[2] *Stockholm Pipe Fittings Co.*, 1 LA 162, 162 (McCoy, 1945).
[3] *See Kaiser Sand & Gravel*, 49 LA 190 (Koven, 1967).
[4] *See Schulze & Burch Biscuit Co.*, 100 LA 948, 955 (Goldstein, 1993) ("inherent in the power to review is the authority to exercise the right to change or modify a penalty so it is consonant with all the proofs adduced").
[5] *See Platt, The Arbitration Process in the Settlement of Labor Disputes*, 31 J. AM. JUD. SOC'Y 54, 58 (1947).
[6] *See Mississippi Valley Gas Co.*, 41 LA 745, 750 (Hebert, 1963) ("there is a duty in the arbitration process to determine whether the 'punishment fits the crime").
[7] *AFSCME v. Department of Central Management Services*, 173 Ill. 2d 299, 671 N.E.2d 668 (1996) ("DuBose").
[8] *Id.* at 322-23, 671 N.E.2d at 680 ("Nothing in our decision restrains an arbitrator from imposing sanctions against employers who violate a contractual provision. The arbitrator remains free to determine appropriate remedies within the confines of the collective-bargaining agreement. As the Eighth Circuit Court of Appeals has stated: 'As long as the arbitrator's remedy is 'rationally explainable as a logical means of furthering the aims of the contract'. . ., the arbitrator may for example, impose monetary penalties, order the employer to reimburse the employee for rehabilitation programs, order reinstatement of the employee to a position in which he poses no danger to the public, or create its own unique sanction to deter overreaching by the employer.' *Union Pacific R.R. Co. v. United Transportation Union*, 3 F.3d 255, 263 (8th Cir. 1993). In fact, as long as the arbitrator makes a rational finding that the employee can be trusted to refrain from the offending conduct, the arbitrator may reinstate the employee to his or her former job, and we would be obliged to affirm the award. . . . However, the arbitrator's freedom in fashioning an appropriate remedy is not without limitation, as this case amply demonstrates. Where, as here, an arbitrator awards full reinstatement as a remedy for the contractual violation without any findings that the worker poses no risk to the welfare and protection of DCFS's children and their families, the award simply cannot stand.").
[9] 420 U.S. 251 (1975).
[10] *See McCartney's, Inc.*, 84 LA 799 (Nelson, 1985) (employer delayed discharge for five months to avoid interfering with insurance coverage of the grievant's medical treatments).
[11] *See Inland Tool & Mfg. Co.*, 65 LA 1203 (Lipson, 1975) (delay to protect an undercover agent's identity to catch "bigger fish").
[12] 86 LA 120 (Feldman, 1985).
[13] 110 LA 8 (Nadelbach, 1998).
[14] *Id.* at 9.
[15] 98 LA 643 (Hodgson, 1992).
[16] *Id.* at 648.
[17] 110 LA 641 (Prayzich, 1998).
[18] *Id.* at 646.
[19] 84 LA 868 (Keefe, 1985).
[20] *Id.* at 870.
[21] 84 LA 795 (Hunter, 1985).
[22] *Id.* at 798.
[23] *Id.*
[24] 111 LA 210 (Olson, 1998).
[25] *Id.* at 215.
[26] 75 LA 473 (Bridgewater 1980).
[27] *Southeastern Trailways*, 82 LA 810, 813 (Craver, 1984) (reinstating without backpay a cashier who borrowed money from the till, but made no effort to conceal it and apparently meant to make up the difference before the cash was picked up for the day. Failure to grant backpay in recognition of serious nature of offense and to send a clear message to employees that care must be used in money handling).
[28] 102 LA 1179 (Stallworth, 1994).
[29] *Id.* at 1184.
[30] *Id.*
[31] 82 LA 126 (Draznin, 1983).
[32] *Id.* at 130.
[33] 81 LA 1083 (Hill, 1983).
[34] 107 LA 276 (Koenig, 1996).
[35] 102 LA 1057 (Duff, 1994).
[36] 111 LA 180 (DiLauro, 1998).
[37] 88 LA 587 (Wolf, 1986).
[38] *Id.* at 590.
[39] *Id.* at 591.
[40] 102 LA 622 (Doering, 1994).
[41] *Id.* at 626.
[42] 93 LA 782 (Doering, 1989).
[43] *Id.* at 789.
[44] 83 LA 870 (Talent, 1984).
[45] 79 LA 640 (Hunter, 1982).
[46] 114 LA 1374 (Shanker, 2000).
[47] *Id.* at 1378.
[48] 99 LA 143 (Stallworth, 1992).
[49] 98 LA 905 (Stallworth, 1992).
[50] *Id.* at 910.
[51] 87 LA 589 (Christopher, 1986).
[52] 104 LA 825 (Witherspoon, 1995).
[53] 111 LA 1063 (Allen, 1999).
[54] *Id.* at 1069.
[55] 113 LA 72 (Kessler, 1999).
[56] *Id.* at 77. ◆

RECENT DEVELOPMENTS

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focues on developments under the two collective bargaining statutes.

IELRA Developments

Arbitration

In *Chicago Teachers Union, Local 1 and Chicago Board of Education,* Case No. 2001-CA-0003-C (IELRB, 2002), the IELRB held that an arbitration award returning a grievant to her pre-termination status of reserve teacher was not binding because it interfered with the Chicago Board of Education's right to discharge, employ or lay off employees, a right vested solely in the school board by statute. The IELRB remanded the matter to the arbitrator to craft a new remedy.

The grievant was laid off from her job as a teacher. The grievance contended that the school board had violated its own policies regarding the reassignment and layoff of teachers. The grievant's unrefuted testimony during arbitration was that the school board failed to follow its policy because it failed to provide her with lists of vacancies for which she was qualified, did not allow her to interview at other schools, and did not give her any job counseling or other assistance. The arbitrator agreed and ordered that she

be returned to her pre-termination status of reserve teacher and that the school board comply with its policy by providing her with the assistance outlined therein. The school board refused to comply with the arbitrator's award.

The IELRB concluded that the award conflicted with Section 34-8.1 of the School Code, 105 ILCS 5/34-8.1, which states, in pertinent part, "the right to employ, discharge and layoff shall be vested solely with the [school] board." The IELRB agreed with the school board's argument that the effect of the arbitrator's remedy was to reinstate the grievant to employment with the Chicago Board of Education.

The IELRB found the Illinois Appellate Court case of Chicago School Reform Board of Trustees v. IELRB, 309 Ill.App.3d 88, 721 N.E.2d 676 (1st Dist. 1999) ("Brown"), controlled in this matter. In *Brown* the Appellate Court, relying on the legislative history, concluded that the Chicago School Reform Act was intended to grant absolute power to the Chicago Board of Education to discharge employees. Further, according to the more recent Appellate Court decision of Land v. Board of Education, 325 Ill.App.3d 294, 757 N.E.2d 912 (2001), appeal allowed, No. 92837 (Ill. Feb. 6, 2002), the school board could not exercise its authority by adopting a policy such as the one in question.

Although the IELRB found the arbitrator's award unenforceably, it held that the arbitrator had the authority to decide whether the school board followed the proper procedures prior to terminating the grievant. Citing *Board of Education of Harrisburg Community Unit School District No. 3 v. IELRB*, 227 Ill.App.3d 208, 591 N.E.2d 85 (4th Dist. 1992), the IELRB remanded the matter to the arbitrator to devise an award that would not conflict with Section 34-8.1.

IPLRA Developments
Peace Officers

In *Metropolitan Alliance of Police, DuPage County Sheriff's Chapter #126 v. County of DuPage and Sheriff of DuPage County*, No. S-RC-00-059 (ILRB State Panel 2002), the State Panel held that Corrections Bureau deputies (CBDs) are not statutory peace officers within the meaning of Section 3(k) of the IPLRA.

In deciding whether the CBDs, who are security officers under Section 3(p) of the Act, were peace officers as defined by Section 3(k), the State Panel recognized that the legislature clearly established in Section 3(s)(1) that peace officers belonged to a special class of employees. Because of this special status, their bargaining units are to be kept separate from non-peace-officer units. Further, the only way to combine peace and non-peace-officer units is if both parties to the bargaining process agree. The legislature created one definition for peace officers and one for security officers. The State Panel reasoned that, because the legislature established two separate definitions for these employees, it intended for security officers and peace officers to be classified separately. Therefore, in the instant case unless the State Panel found that the CBDs were peace officers or that the employer and union agreed to include them, they could not be included in the peace-officer bargaining unit.

The definition of peace officer in Section 3(k) of the Act states that true peace officers must be "appointed to a police force, department, or agency" and "sworn or commissioned to perform police duties." 5 ILCS 315 (2000). They protect the public at large and maintain public order. The State Panel noted that while other states have identified true police officers as those who protect the whole citizenry; it was not going to confer the status of peace officer to employees simply by identifying their "police" duties. Instead, in determining peace-officer status, it chose to look at the "essential nature" of the CBD responsibilities and whether that nature is to protect the public at large or maintain public order.

CBDs are not peace officers under the Act because their essential duties do not protect the public at large or maintain public order. The State Panel noted in this decision that the deputies at issue work in a tightly controlled environment within the confines of the jail or prisoner work areas. They are not in the "public arena" and do not protect the public at large. The employer argued, however, that similar to peace officers, the CBDs sometimes are armed and do receive firearm training as well as perform arrests. The State Panel responded that the nature of these duties remain substantially different from those of peace officers. It explained that the CBDs perform these activities in a controlled environment away from the public at large as a part of their custodial duties. A true peace officer performs these duties out in the public, in an uncontrolled environment to protect the public and maintain public order. Further, it recognized that by performing these custodial duties upon prisoners, the CBDs do not maintain public order as do true peace officers.

The employer argued that many CBDs participate in "stand-alone" duties on a part-time or temporary basis which do involve the public at large. It also argued that these deputies may be cross-trained with other deputies in the future. The State Panel rejected these arguments, maintaining that the focus must be on the employees' primary duties which, in the case of the CBDs, do not involve the public at large. It noted that the legislature specifically excluded "part-time police officers" from Section 3(k)'s definition of peace officer. Further, Section 3(k) excludes in several places the individual who is not "routinely" required to perform arrests. Therefore, the State Panel concluded that the part-time "stand alone" and speculative duties cannot be used to determine peace-officer status. ◆

Further References

(compiled by Margaret A. Chaplan, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

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This study, based on a survey of about 250 local union leaders in British Columbia, Canada, examines satisfaction with grievance procedures. Empirical analysis of the results indicates that union leaders are more satisfied with grievance procedures if they have more discretion in decision making, the membership of the local is smaller, the filing rate is low, the issue being grieved is seen as important, the rate of grievance resolutions is high, a greater number of grievances are settled in the early stages, and the union's success rate is high.

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The authors surveyed municipal government agencies across the United States asking about their use of criminal background checks for job applicants and for currently employed workers. Half of the agencies, primarily law enforcement agencies, conduct checks on all prospective hires; others restrict checks to public safety positions. Agencies that did not conduct checks on all prospective hires often did checks if the position were of a sensitive nature, had fiduciary responsibilities or responsibility for handling money, had access to confidential data, or involved work with vulnerable adults. The survey also gathered data on the timing of the background check, the entity that conducted the investigations, whether current employees were investigated, and whether the agency's procedure had been subject to a legal challenge. Issues and concerns related to conducting background checks and privacy issues are also discussed.

Shafritz, Jay M., David H. Rosenbloom, Norma M. Riccucci, Katherine C. Naff, and Albert C. Hyde. PERSONNEL MANAGEMENT IN GOVERNMENT: POLITICS AND PROCESS. 5th ed. New York: Marcel Dekker, 2001. 587p.

This is the latest edition of a widely-used textbook on personnel management in government. Chapters cover the history and environment of public personnel management, human resources planning, classification and compensation, recruitment and selection, performance appraisal, training and development, quality management, equal employment opportunity and affirmative action, workforce diversity, labor management relations, and employee relations, mainly in state and local government, but including references to federal government. Each chapter is followed by a bibliography.

(Books and articles anotated in Further References are available on interlibrary loan through ILLINET by contacting your local public library or system headquarters.)

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